S & F INTERNATIONAL LTD.

v.

TRANS-CON ENGINEERING SDN. BHD.

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI FJ
ABDOOLCADER FJ
[CIVIL APPEAL NO. 29 OF 1984]
17 SEPTEMBER 1984

CIVIL PROCEDURE: *Order of Mareva injunction - Whether justified - Respondent's claim for damages and costs - Supported by later evidence - Effect.*

The appeal was against the order of the High Court granting a Mareva injunction in respect of moneys due to the appellant under a contract entered into with the National Electricity Board ("the Board") for the installation of electricity transmission lines in a project in Perak and Kelantan. The respondent claimed a sum of RM2,025,822.40 as the amount due and payable under a sub-contract with the appellant for the execution of certain works and services relating to the installation of those transmission lines.

The respondent also claimed "damages and/or additional costs" of RM4,500,000 for delays and change of circumstances. An order in terms of the *ex parte* application was made. The appellant applied for the order to be set aside or in the alternative that it be varied to the extent that it restrained the sum of RM2,025,822.40 only, held for its benefit under its contract with the Board. The learned Judge varied his earlier order by limiting the Mareva order only to the moneys held to the account of the appellant by the Board under the main contract between them. The appellant appealed against the order and asked that it be either set aside or alternatively that it be limited to the sum of RM2,025,822.40 only.

Held:

[1] There was no reason or justification to interfere with the exercise of the Judge's discretion in relation to the Mareva order he made in respect of the respondent's claim for the sum of RM2,025,822.40. It would appear on a consideration of the affidavit evidence that the moneys due from the Board to the appellant were its only asset of any substance within the jurisdiction, that the respondent in fact had a strong arguable case on the facts in relation to the claim and that there was a risk of dissipation of the appellant's assets. The Judge considered all these matters and was satisfied on the affidavit evidence. The discretion whether or not to grant an interlocutory injunction is vested in the High Court Judge and not the appellate Court whose function initially is one of review only. The appellate Court will not overrule the decision of the Judge at first instance, unless, broadly speaking, the Judge has made an error of law or misconceived the facts. *(Duport Steels Ltd. v. Sirs* [1980] 1 WLR 142; *Hadmor Productions Ltd. v. Hamilton* [1983] AC 191, 220; *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] 1 AC 130; *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. UND Co. K.G.* [1983] 1 WLR 1421; [1984] 1 All ER 398, 418).

[2] There was, however, no justification whatsoever for any protection by way of a Mareva order for the respondent in respect of its purported claim for "damages and/or additional costs". The Judge committed a grave error and was under a serious misconception when he held that he was entitled to rely on an undated and unsigned document with no mention of the amount of the purported claim as evidence in support of the pleading. On this aspect of

the matter the Court could interfere with the Judge's exercise of his discretion. A Mareva application must necessarily in respect of the claim on which it is premised relate to the pleading of the plaintiff in the action instituted and even if it is sought to remedy the position by affidavit, it would make no difference as any defect or omission in a statement of claim cannot be made good by affidavit evidence. *(Gold Ores Reduction Co. v. Parr* [1892] 2 QB 14; *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors.* [1983] 1 MLJ 206, 207).

[Appeal allowed with costs. Order varied.]

Cases also referred to:

Mareva Compania Naviera SA v. International Bulkcarries SA [1980] 1 All ER 213
Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd. [1982] 1 MLJ 260
PCW (Underwriting Agencies) Ltd. v. Dixon & Anor. [1983] 2 All ER 158
Campbell Mussells & Ors. v. Thompson & Anor. The Times, 30 May 1984
Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft mbH UND Co. KG [1984] 1 ALL ER 398
Duport Steels Ltd. v. Sirs [1980] 1 WLR 142
Hadmor Productions Ltd. v. Hamilton [1983] AC 191
Garden Cottage Foods Ltd. v. Milk Marketing Board [1984] 1 AC 130
Gold Ores Reduction Co. v. Parr [1892] 2 QB 14
United Malayan Banking Corporation Berhad v. Palm & Vegetable oils (M) Sdn. Bhd. & Ors. [1983] 1 MLJ 206

Legislation referred to:

Companies Act 1965, s. 332(1)

For the appellant - S. Periasamy (V. Radha with him); M/s. Rashid & Lee
For the respondent - N. Chandran; M/s. Adnan, Sundra & Low

JUDGMENT

Abdoolcader FJ:

This appeal involves by way of review of the exercise of its discretion by the High Court the determination of the justification for or in the alternative at least the extent and ambit of a Mareva injunction granted to the respondent in respect of moneys due to the appellant under a contract entered into with the National Electricity Board ("the Board"). The order known as a Mareva injunction - so named after the case of *Mareva Compania Naviera SA v. International Bulkcarriers SA* [1980] 1 All ER 213, decided in June 1975 and the second case in which the English Court of Appeal granted this form of relief - is a species of interlocutory injunction which restrains a defendant by himself or by his agents or servants or otherwise from removing from the jurisdiction or disposing of or dealing with those of his assets that will or may be necessary to meet a plaintiff's pending claim. The policy underlying and the principles governing an order of this nature have been expounded and ossified in a catenation of congeneric cases and the relief so afforded when the circumstances of a case merit it has been acknowledged by this Court in *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn. Bhd.* [1982] 1 MLJ 260 in the matter of jurisdiction to avail here.

Adverting now briefly to the facts of the instant matter, the appellant entered into a contract on 30 May 1980 with the Board for the installation of electricity transmission lines in a major project in the Perak and Kelantan area and we are told that the contract sum involved is in the region of RM40 million. The appellant in turn by a contract dated 1 August 1980 sub-contracted the execution of certain works and services relating to the installation of these

transmission lines to the respondent, and the contract price is stated therein to be in the region of RM10 million odd subject to variations in accordance with its provisions. The respondent claims in these proceedings a sum of RM2,025,822.40 as the amount due and payable under its sub-contract with the appellant. We should perhaps add that although there was some dispute in the Court below as to the quantum of this claim, the parties agreed before us that the amount of the claim in this sum as set out in the statement of claim should stand. We would also point out that the several sums specified in respect of this claim enumerated in the respondent's pleading are in fact supported by invoices which are verified and explained in an affidavit of the managing director of the respondent. There is then in addition to the sum we have mentioned a claim by the respondent for "damages and/or additional costs" which appears in para. 8 of the respondent's statement of claim and which we think should be set out *in extenso*:

> 8. The plaintiffs also claim against the defendants for damages and/or additional costs for delays and change of circumstances. The full particulars and actual amount of the damages and/or additional costs will be notified to the defendants and this Honourable Court before the hearing of this suit and are believed to be in the region of RM4,500,000.

The writ in this action was issued on 3 October 1983 and on the same day the respondent took out an *ex parte* notice of motion for a Mareva order against the appellant in respect of its moneys in two bank accounts, the plant, machinery and the like at the work site and any moneys held to the account of the appellant under the main contract entered into with the Board. An order in term of this *ex parte* application was made by Vohrah J, on 5 October 1983 with liberty to the appellant to apply to set aside the order within fourteen days. The appellant accordingly applied on 12 October 1983 by an *inter partes* summons for the order of 5 October 1983 to be set aside or in the alternative that it be varied to the extent that it restrains the sum of RM2,025,822.40 only held for its benefit under its contract with the Board. Voluminous and copious affidavits with a mass of supporting exhibits were filed on both sides, and on the matter coming on for hearing the learned Judge by an order made on 26 January 1984 varied his earlier order made *ex parte* by limiting the Mareva order only to the moneys held to the account of the appellant by the Board under the main contract between them. The appellant now appeals against this order of 26 January 1984 and asks that it be either set aside or alternatively that it be limited to the sum of RM2,025,822.40 only.

It might perhaps be convenient at this stage to concisely perpend the principles and policy underlying a Mareva order elucidated in a chain of related cases of which we need only refer to three. In *PCW (Underwriting Agencies) Ltd. v. Dixon & Anor.* [1983] 2 All ER 158 which sets out the policy underlying the Mareva jurisdiction, it was held that the sole purpose of a Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, and that the remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action. This decision of Lloyd J went on appeal to the Court of Appeal ([1983] 2 All ER 697) which however did not deliver a judgment but by consent allowed the appeal and varied the Judge's order, but the principles enunciated by Lloyd J, were unaffected by the consensual variation made in the light of the factual circumstances of that case. The English Court of Appeal has also held in *Campbell Mussells & Ors. v. Thompson & Anor.*, The Times, 30 May 1984 that a Mareva injunction was never intended to put a plaintiff in the position of a secured creditor and every case had to be dealt with on its own merits.

Mustill J held in *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. UND CO. K.G.* [1984] 1 All ER 398 that: (1) Before a Mareva injunction will be granted, a plaintiff must show first that he has a good arguable case, which is more than being barely capable of serious argument, but not necessarily one that the Judge believes has got more than a fifty per cent chance of success; (2) Before such relief is granted the plaintiff must secondly show that there is a risk that assets will be dissipated: he must demonstrate this by solid evidence, e.g. that the defendant's previous actions show his probity is not to be relied upon or that the corporate structure of the defendant infers that it is not to be relied upon, but mere proof that the defendant is incorporated abroad will not suffice; (3) In reaching its conclusion, the Court should take into account the defendant's evidence as well as the plaintiff's. The English Court of Appeal in dismissing an appeal by the plaintiffs in that case [1983] 1 WLR 1412; [1984] 1 All ER (at p. 413) restated the principles of Mareva applications and held that the jurisdiction to grant Mareva injunctions was exercisable in cases where it appeared just and convenient to the Court to grant the injunction, and the plaintiff had, *inter alia*, to show, on the evidence as a whole, that there was at least a good arguable case that he would succeed at the trial, and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction.

We should perhaps also reiterate and stress the point that the discretion whether or not to grant an interlocutory injunction is vested in the High Court Judge and not the appellate Court whose function initially is one of review only, and it will not overrule the decision of the Judge at first instance unless, broadly speaking, he has made an error of law or misconceived the facts, and except in those circumstances it must defer to the Judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate Court would have exercised the discretion differently: *Duport Steels Ltd. v. Sirs* [1980] 1 WLR 142; *Hadmor Productions Ltd. v. Hamilton* [1983] AC 191, 220; *Garden Cottage Foods Ltd. v. Milk Marketing Board* [1984] 1 AC 130. These decisions of the House of Lords were referred to and applied by the English Court of Appeal in *Ninemia Maritime Corporation* [1983] 1 WLR (at p. 1421); [1984] 1 All ER (at p. 418) where Kerr LJ in delivering the judgment of the Court stated that recent decisions of the House have emphasised the importance of appellate Courts resisting the temptation to interfere with the exercise of judicial discretions other than in limited circumstances.

Turning now to the facts of the matter before us in relation to the granting of the Mareva order in this case in its final form, we have already observed that the amount claimed by the respondent as due and payable by the appellant under the sub-contract between them in the sum of RM2,025,822.40 is supported by invoices verified and explained by sworn evidence. The affidavit evidence also discloses that the appellant is "a corporation duly organised and existing under the laws of Thailand" with its principal place of business in Bangkok. That of course by itself, as we have pointed out, would not suffice. It is also registered locally under the provisions of s. 332(1) of the Companies Act, 1965 with its local registered office as care of their solicitor's address in Kuala Lumpur, as notice of the situation of its registered office in Malaysia in an explicit requirement under that statutory provision in respect of every foreign company which establishes a place of business or commences to carry on business within Malaysia. All the directors and shareholders of the appellant are foreigners being either Thai or Japanese citizens, and the managing director of the respondent also avers on oath that the appellant was formed solely for the project under its contract with the Board for the

installation of transmission lines under a joint venture between a Thai company, Sri U Tong and a Japanese company, The Fujikura Cable Works Ltd. (now known as Fujikura Ltd.), and that the respondent has no other contract or project of any kind in Malaysia or elsewhere. He also avers that the respondent has since learnt that the appellant's Kota Bharu office is now closed and that communications with it are only possible through its Bangkok office or the offices of Fujikura Ltd. The respondent's managing director has also affirmed that Yan Yong, an assistant site manager of the appellant at Kota Bharu, had on one occasion in January 1983 remarked that if the respondent persisted in its claim the appellant "would be wound up (presumably after all their assets have been disposed of)". Yan Yong has however affirmed to an affidavit to deny any such statement by him.

It would thus appear that on a consideration of the affidavit evidence the moneys due from the Board to the appellant are its only asset of any substance within the jurisdiction, that the respondent has in fact a strong arguable case on the facts in relation to the claim for moneys due and payable in the sum of RM2,025,822.40 and that there is a risk of dissipation of the appellant's assets particularly in the light of the fact that its corporate structure infers that it is not to be relied upon. The learned Judge considered all these matters and stated that he was satisfied on the affidavit evidence accordingly, and we can find no reason or justification to interfere with the exercise of his discretion in relation to the Mareva order he made in respect of the respondent's claim for the sum of RM2,025,822.40.

We now advert to the claim of the respondent for "damages and/or additional costs" which "are believed to be in the region of RM4,500,000" as pleaded in para. 8 of the statement of claim which we have earlier set out in full. The only heelpiece to this rather vague, inchoate and amorphous claim of uncanalised fluidity pleaded without any particularity and purportedly premised *ex facie* on mere speculation and serendipity in the form it appears in the pleading is an averment by the managing director of the respondent in an affidavit affirmed on 21 October 1983 in para. 8 thereof to this effect:

> The plaintiffs have had prepared documents to substantiate their claims for additional or extra cost, loss and expense incurred on this project due to changed and varied circumstances and for damages for breach of contract. The final quantification with reasons and causes has been completed and submitted to the defendants. A true copy of this document is annexed hereto marked 'LSY-35'

This document is undated and unsigned with a cover page bearing the name "J.D. Kingsfield International Ltd." and underneath it the legend "International Commercial And Construction Management Services" without any indication whatsoever of the author's qualifications or standing, and refers in a section of it under the heading "Financial Considerations" to a figure of some RM17 million as the total cost up to 15 October 1983 and ends with a "total amount of claim" in the sum of nearly RM9 million with no mention whatsoever of the sum of RM4,500,000 referred to in para. 8 of the statement of claim.

The project manager of the appellant has specified in an affidavit affirmed by him on 12 October 1983 the procedure required for claims in addition to the contract price and in a further affidavit affirmed on 1 December 1983 avers that the respondent did not and has not given notice of its purported claim "believed to be in region of RM4,500,000" in accordance with the requisite procedure, and had not furnished any proof, documentary or otherwise, to support or substantiate the purported claim as required by the contract between them nor has it given any particulars or details of the claim in this respect in this pleading or affidavit evidence.

The learned Judge however held that he was entitled to rely on the pleading as it appears in the statement of claim in respect of the sum of RM4,500,000 and repeated *ipsissimis verbis* in the affidavit in support of the *ex parte* application for a Mareva order. He also held that he was entitled in reviewing his earlier *ex parte* order to look at "later evidence", as he put it, and went on to hold that this claim of the respondent ("believed to be in the region of RM4,500,000") "has now *prima facie* been supported in exhibit LSY-35". We regret we find that in this conclusion a grave error and serious misconception and cannot but be in a state of nescience as to how an undated and unsigned document with no mention of the amount of the purported claim by the respondent can be considered as evidence in support of a pleading in that respect which we think we have sufficiently described earlier as one which in regard to substance and form cannot even withstand the test of casual curial scrutiny. We would *en passant* observe that a Mareva application must necessarily in respect of the claim on which it is premised relate to the pleading of the plaintiff in the action instituted and even if it is sought to remedy the position by affidavit, it would make no difference as any defect or omission in a statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co. v. Parr* [1892] 2 QB 14 where Mathew J, said that "it is most important that a defendant should know from the writ what the exact claim against him is"; this case was followed and applied by this Court in *United Malayan Banking Corporation Berhad v. Palm & Vegetable Oils (M) Sdn. Bhd. & Ors.* [1983] 1 MLJ 206 (at p. 207).

We accordingly in the circumstances for the reasons we have given find that there is no justification whatsoever for any protection by way of a Mareva order for the respondent in respect of its purported claim for "damages and/or additional costs" "believed to be in the region of RM4,500,000." We find that this is indeed a case where we can on this aspect of the matter interfere with Judge's exercise of his discretion in regard to the order he made on 26 January 1984. Indeed when in the course of hearing argument we put the several matters we have adumbrated to Counsel for the respondent he had perforce to agree that he cannot rely on the document marked "LSY-35" which purports to be a report of some sort but which is undated and unsigned and had to concede that he cannot accordingly sustain the learned Judge's order as to the purported claim for RM4,500,000 and now asks the Court to vary the order by limiting it to the amount claimed as due and payable by the appellant in the sum of RM2,025,822.40.

In the event at the conclusion of argument we allowed the appeal with costs and varied the order of 26 January 1984 made by the learned Judge by the insertion of the words "to the extent of RM2,025,822.40" in respect of the moneys held to the account of the appellant by the Board under the main contract. We also directed that the deposit lodged in Court by way of security be refunded to the appellant.

Also found at [1985] 2 CLJ 228